Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Billed Party Preference for InterLATA 0+ Calls	)	CC Docket No. 92-77
	)	

SECOND FURTHER NOTICE OF PROPOSED RULEMAKING

Adopted: June 4, 1996; Released: June 6, 1996

Comment Date: 30 days after date of publication of Federal Register notice
Reply Comment Date: 60 days after date of Federal Register notice

By the Commission:

TABLE OF CONTENTS

Appendix C

CompTel Coalition's Proposed Benchmark Ceilings

Appendix D

Benchmark Data

Appendix E

Benchmark Tables

I. INTRODUCTION

1. In enacting the Telecommunications Act of 1996 (1996 Act),[1] Congress sought to establish "a pro-competitive, de-regulatory national policy framework" for the United States telecommunications industry.[2] The statute requires, within nine months of its enactment, that the Commission prescribe regulations to promote competition among payphone service providers, including promulgating regulations by which payphone owners are compensated for "each and every completed intrastate and interstate call using their payphone...."[3] The Commission is addressing payphone compensation, public interest payphone, and related issues in a comprehensive manner in another proceeding.[4] The instant proceeding is concerned with narrower issues related to the provision of operator services from payphones.

2. In May 1994, the Commission tentatively concluded that the implementation of a "billed party preference" (BPP) system for 0+ interLATA payphone traffic and for other types

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1 Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.

2 S. Conf. Rep. No. 104-230, 104th Cong., 2nd Sess. 1 (1996) (hereinafter Joint Explanatory Statement).

3 1996 Act at § 276(b)(1)(A). We have committed to adopting a notice of proposed rulemaking in this area in May 1996. See Common Carrier Bureau Public Forum on Implementing the Telecommunications Act of 1996 (Feb. 23, 1996) at 4. That proceeding will also include Commission consideration of "whether public interest payphones, which are provided in the interest of public health, safety, and welfare, in locations where there would otherwise not be a payphone, should be maintained..." § 276(b)(2).

4 In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Notice of Proposed Rulemaking, CC Docket No. 96-128, FCC 96-254 (June 6, 1996).

of operator-assisted interLATA traffic would serve the public interest.[5] Under BPP, operator-assisted long-distance traffic would be carried automatically by the operator services provider (OSP) preselected by the party being billed for the call.[6] Given the estimated cost of BPP, calculated in the neighborhood of $1 billion as of 1993, and the approximate year-old age of much of the data of record on which this tentative conclusion was based, however, we sought further comment. We asked for confirmation of, or adjustments to, our data and analysis and also for proposals for less costly alternatives to BPP. We stated that we would mandate BPP only if its benefits outweighed its costs, and those benefits could not be achieved through alternative, less costly, means.[7]

3. In this Second Further Notice of Proposed Rulemaking, we find that the record supports the conclusion that we should adopt the modified combination of proposed alternatives to BPP discussed below. We tentatively conclude that we should: (1) establish benchmarks for OSPs' consumer rates and associated charges that reflect what consumers expect to pay and (2) require OSPs that charge rates and/or allow related premises-owner fees whose total is greater than a given percentage above a composite of the 0+ rates charged by the three largest interstate, interexchange carriers to disclose the applicable charges for the call to consumers orally before connecting a call. Alternatively, we seek comment on requiring all OSPs to disclose their rates on all 0+ calls. We also solicit comment on proposed rules with respect to the filing of informational tariffs for interstate operator services and under what circumstances we may or must forbear from enforcing tariff-filing requirements applicable to OSPs. Further, we solicit comment on whether the public interest would be better served by some alternative remedy than BPP for calls from inmate-only telephones in prisons.

4. While we continue to believe that BPP would generate significant benefits for consumers, the record indicates that the cost of BPP would likely be quite substantial. Given this cost, we seek comment on whether, at this time, it is in the public interest to adopt our disclosure alternative now. In the alternative, we seek comment on the cost of requiring all OSPs to disclose their rates for each 0+ call from a public payphone. We note, however, that we intend to give further consideration to BPP as local number portability develops, which is mandated under Section 251(b)(2) of the 1996 Act.[8] If local exchange carriers are required to install the

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[5] Billed Party Preference for 0+ InterLATA Calls, Further Notice of Proposed Rulemaking, CC Docket No. 92-77, 9 FCC Rcd 3320 (1994) (Further Notice). A 0+ call occurs when the caller enters "0" plus an interexchange number, without first dialing a carrier access code. An access code is a sequence of numbers, e.g., 10288, that connects the caller to the interexchange carrier associated with that number sequence.

[6] OSPs include AT&T, MCI, Sprint and all interexchange and exchange carriers that routinely accept interstate collect calls, credit card calls, and/or third-party billing.

[7] Further Notice, 9 FCC Rcd at 3325; see para. 4, infra (number portability).

[8] As local number portability currently is being examined, and in some cases implemented, databases are used to route telephone calls so subscribers may retain their phone numbers when changing their local service provider. See, generally, Telephone Number Portability, Notice of Proposed Rulemaking, 10 FCC Rcd 12350 (1995). §

facilities needed to perform database queries for number portability purposes for each call, the incremental cost to query the database for the customer's preferred OSP might well be less than the incremental benefits that BPP would provide. In the interim, however, this disclosure alternative would appear to provide many of the benefits of BPP at little, if any, cost to consumers.

II. BACKGROUND

5. Interstate 0+ calls from payphones, hotels, motels, and other aggregator locations are routed today to the OSP chosen by the premises or payphone owner.[9] OSPs generally compete with each other and with the traditional carriers to receive such traffic by offering commissions to payphone or premises owners on all 0+ calls from a public phone in exchange for being chosen by the premises owners as the "presubscribed" carrier serving their phones.[10] Many OSPs have chosen to compete with a strategy of charging very high rates and then paying very high commissions to both premises owners and sales agents who sign up those premises owners. While this has proven to be beneficial to the premises owners and sales agents, it forces callers to pay exceptionally high rates. Therefore, in response, more sophisticated callers began to use access codes to avoid the payphone's high-priced presubscribed OSP by "dialing around" that OSP.[11] Because payphone owners and other aggregators do not earn any commissions on "dial around" calls, and since some also experienced fraud due to access code-like dialing, many aggregators blocked the use of access codes from their phones.

6. Congress responded to payphone blocking by enacting the Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA),[12] which directed the Commission to

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251(b)(2), 47 U.S.C. § 251(b)(2), provides that each local exchange carrier has "[t]he duty to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission."

[9] Prior to 1988, all 0+ traffic from Bell Operating Company (BOC) and GTE payphones was routed to AT&T. In October 1988, Judge Harold H. Greene of the U.S. District Court for the District of Columbia ordered the BOCs to implement a presubscription system for BOC payphones, and, shortly thereafter, ordered GTE to do the same. In these orders, Judge Greene stated that a BPP system would be most consistent with the AT&T divestiture decree, but he recognized that it was not economically viable or technically feasible at the time. Still, he stated his expectation that the BOCs would continue expeditiously to perfect a line identification database system, which would permit BPP. United States v. Western Electric Co., 698 F. Supp. 348, 367 (D.D.C. 1988).

[10] "Public phones" refers here to payphones and other aggregator phones, including hotel phones. Under the Communications Act, an aggregator is "any person that, in the ordinary course of its operations, makes telephones available to the public or to transient users of its premises, for interstate telephone calls using a provider of operator services." 47 U.S.C. § 226(a)(2).

[11] A consumer "dials around" a presubscribed carrier by dialing an access code prefix (e.g., 1-800-CALL ATT to reach AT&T or 10333 to reach Sprint) in order to reach the consumer's preferred long distance carrier.

[12] Pub. L. No. 101-435, 104 Stat. 986 (1990) (codified at 47 U.S.C. § 226).

promulgate regulations to "protect consumers from unfair and deceptive practices relating to their use of operator services to place interstate telephone calls ... [and to] ensure that consumers have the opportunity to make informed choices in making such calls."[13] Among the regulations that we have issued pursuant to that mandate is a requirement that payphone providers and other aggregators permit callers to use 10XXX, 1-800 and 950 access codes to reach their preferred carriers.[14] We also issued regulations prescribing compensation to aggregators for access code calls.[15]

7. In November 1992, it was thought that market forces would ensure that rates and charges would be just and reasonable,[16] and, to date, our unblocking and consumer information requirements have, for the most part, resulted in greatly enhanced consumer choice in the operator services market. One problematic aspect of the pre-TOCSIA operator services environment has remained, however. Many aggregators continue to base their presubscription decisions on the commissions that OSPs will pay them rather than on the rates and services that OSPs offer to callers. As a result, many callers who are unwilling, unable or not readily able to use access codes are forced to pay high charges to the OSPs that are offering corresponding high commissions to aggregators. Such callers may also face high charges if the OSP, or some other billing entity, is including aggregator surcharges in the total charges billed to the consumer for the call. While the Commission's orders pursuant to TOCSIA have addressed some of the most serious problems presented by a presubscription system of equal access for public phones,[17] we

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[13] See 47 U.S.C. § 226(d)(1).

[14] See 47 C.F.R. § 64.704. The Commission has required unblocking of all payphones. Other aggregator phones must also be unblocked, except for equipment that was manufactured or imported before April 17, 1992 and which cannot be modified to permit access code dialing, without creating a significant danger of toll fraud, for less than fifteen dollars per line. Commission rules do not require these phones to be unblocked until April 17, 1997. See 47 C.F.R. § 64.704(c)(5).

[15] The United States Court of Appeals for the District of Columbia Circuit reversed and remanded an earlier finding of the Commission in CC Docket No. 91-35 that subscriber 800 calls were not within the class of calls for which Congress intended the Commission to consider prescribing compensation under TOCSIA. Florida Public Telecommunications Association, Inc. v. FCC, 54 F.3d 857 (D.C. Cir. 1995). The court directed the Commission to consider whether competitive payphone owners should be compensated for originating subscriber 800 calls from their payphones. In recognition of arguments raised by the competitive payphone industry about their continued viability in light of the developments fostered by this proceeding and, by the general increase in non-revenue-generating calls from competitive payphones, we will act on the remand in conjunction with the implementation of the 1996 Act, which requires that payphone owners be compensated for all calls. See para. 1, supra; 1996 Act at § 276(b)(1)(A).

[16] Final Report of the FCC Pursuant to the Telephone Operator Services Improvement Act of 1990, Nov. 13, 1992 (TOCSIA Report) at 33.

[17] See, e.g., Policies and Rules Concerning Operator Service Providers, Report and Order, CC Docket No. 90-313, 6 FCC Rcd 2744 (1991) (TOCSIA Order). In the TOCSIA Report, the Commission found that the level of compliance with various of our TOCSIA consumer protection requirements per number of telephones surveyed ranged from 64 percent to 96 percent as of July 1992. TOCSIA Report at 15-16. We concluded that these

have observed that other problems remain. In particular, the Commission noted that many callers find dialing around for operator service calls to be burdensome and confusing.[18] Therefore, in April 1992, the Commission initiated this rulemaking proceeding to consider BPP.[19]

8. The current branding requirements the Commission adopted in response to TOCSIA require an OSP to "[i]dentify itself, audibly and distinctly, to the consumer at the beginning of each telephone call and before the consumer incurs any charge for the call."[20] This identification is intended to notify consumers before they purchase service from a carrier that it might not be their primary interexchange carrier (PIC).[21] While the existing branding rule may be effective in many cases, the large number of complaints received by the Commission and state regulators suggests that it is inadequate notice to prevent consumer surprise and dissatisfaction for a substantial number of calls.[22]

9. While BPP is certainly one option we have considered to supplement our rules, in our Further Notice, we encouraged parties to suggest alternatives to BPP and asked that any such alternatives be described "with specificity so that we may adequately assess their costs, benefits, and feasibility in relation to BPP."[23] We asked for alternatives because the record indicated that the cost of BPP was likely to be more than a billion dollars. A number of parties offered general comments in 1994 in support of rate caps but it was not until February and March of 1995 that two groups of commenters offered specific, detailed alternative proposals.

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requirements were effective in providing consumers the opportunity to reach their carrier of choice through access codes and thereby avoid the high rates charged by some OSPs. We recognized, however, that some calls are still routed to carriers that charge high rates. We also found that these rates are, in many cases, driven by higher costs and, in particular, the higher commissions these carriers pay to aggregators under a presubscription system of equal access. TOCSIA Report at 32-33; see also Further Notice, 9 FCC Rcd at 3321 n.5.

[18] Billed Party Preference for 0+ InterLATA Calls, Notice of Proposed Rulemaking, CC Docket No. 92-77, 7 FCC Rcd 3027, 3030 (1992) (Notice). See Ex Parte letter from Leonard S. Sawicki, Director FCC Affairs, MCI Telecommunications Corporation, to William F. Caton (Nov. 7, 1995); Communications Daily, (Nov. 3, 1995) at 5-6 (Customers prefer to dial fewer numbers to reach their preferred long distance carrier, according to February 1994 and October 1995 Gallop surveys commissioned by MCI).

[19] See Notice, 7 FCC Rcd at 3027.

[20] 47 C.F.R. § 64.703(a)(1); see TOCSIA Order, 6 FCC Rcd at 2756-57.

[21] See Policies and Rules Concerning Operator Service Providers, 5 FCC Rcd 4630, 4631-32 (1990) (citing Telecommunications Research and Action Center v. Central Corporation, 4 FCC Rcd 2157, 2159 (Com. Car. Bur. 1989)).

[22] The Commission received more than 4160 complaints about OSPs' interstate rates and 880 complaints about their intrastate rates between August 1, 1994 and August 31, 1995. The rate of such complaints appears to be increasing. More than 525 complaints about OSPs' interstate rates and more than 115 complaints about their intrastate rates were received in August of 1995.

[23] Further Notice, 9 FCC Rcd at 3320.

10. On February 9, 1995, the Telecommunications Subcommittee of the Consumer Protection Committee of the National Association of Attorneys General (NAAG) and the Attorneys General of 23 states petitioned the Commission to impose an additional disclosure requirement on OSPs.[24] The NAAG petition asserts that additional disclosures by OSPs are necessary to prevent unfair and deceptive practices and to improve the opportunity for consumers to make informed choices in accordance with TOCSIA. In particular, NAAG strongly urges the Commission to require those OSPs whose rates and related surcharges are higher than "dominant carrier rates" to provide consumers an oral warning message after the carrier-identification brand.[25] NAAG asks that the Commission adopt the proposed disclosure as an interim protective measure for consumers, while the Commission evaluates BPP or other approaches, and that the proposed disclosure requirement be maintained should the Commission not ultimately adopt BPP.[26]

11. On March 8, 1995, a group of commenters proposed another alternative to BPP. The Competitive Telecommunications Association (CompTel), the American Public Communications Council (APCC), Bell Atlantic, BellSouth Telecommunications, MFS Communications, NYNEX, Teleport Communications Group, and US West (CompTel Coalition) filed an ex parte proposal for a rate "ceiling" on 0+ operator service calls (the CompTel Proposal). The CompTel Coalition urged us to identify a rate level that would be deemed presumptively lawful and thus subject generally to regulatory tolerance. Only OSPs whose rates exceeded such "safe harbor" benchmarks would be subject to regulatory scrutiny, as well as sanctions should their rates be found unjust or unreasonable under Section 201(b) of the Communications Act of 1934, as amended (Communications Act).[27] The CompTel Coalition urged that the Commission set the benchmark rate ceilings on a simple per-minute basis, without regard to time-of-day, distance, or whether the call was handled on an automated basis, made with a calling card, or collect. It proposed benchmark ceilings of $3.75 for the first minute, $7.00 for a nine-minute call, and 35 cents for each minute above nine minutes.[28] CompTel states that its proposed rate-ceiling was set below the general threshold rate level that prompted "virtually all complaints" in a "representative sampling of complaints to the FCC about operator service charges".[29]

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[24] Petition of the National Association of Attorneys General Telecommunications Subcommittee for Rules to Require Additional Disclosures by Operator Service Providers of Public Phones, RM-8606, filed Feb. 9, 1995. Three additional state attorneys general subsequently joined in the NAAG petition.

[25] NAAG Petition at 4. NAAG proposes specific language for such message, which is quoted, infra, at para. 31.

[26] NAAG Petition at 5.

[27] 47 U.S.C. § 201(b) prohibits communications rates that are unjust or unreasonable.

[28] The ceilings urged in the CompTel Proposal are set forth in Appendix C.

[29] CompTel Proposal at 7.

12. On March 13, 1995, the Common Carrier Bureau (Bureau) released a Public Notice soliciting comments on both the NAAG petition and the CompTel Proposal.[30] More than thirty parties filed comments or reply comments in response to that Notice.[31] A number of these commenters suggested variations to these proposals. After the comment cycle closed, the National Association of Regulatory Utility Commissioners (NARUC) passed a resolution addressing issues raised by the NAAG and CompTel proposals.[32] NARUC requested that the Commission carefully consider and implement the following views:

- NARUC continues to support the BPP concept and encourages the FCC to act expeditiously to determine if BPP implementation is justified in light of the costs and jurisdictional issues;

- NARUC does not support the proposed [CompTel] rates of $3.75 and $4.75 because they are "excessively high," but does "support the concept of an effective rate cap on interstate "0+" calls and expanding branding requirements (rate disclosure), as an interim measure only;" and

- NARUC opposes FCC rules precluding States from adopting more safeguards and/or more stringent rules regarding OSPs.[33]

III. ISSUES

13. The vast majority of those commenting on the NAAG and CompTel proposals support the concept of a benchmark to distinguish between OSP calls priced at rates that do not appear to raise any customer concerns and OSP calls priced at rates for which some additional regulatory oversight would appear to be appropriate. Many recognize that the problem stems from a lack of adequate information for callers to make an informed choice. Several commenters characterize the problem as many consumers' misconception that if they use their local exchange carrier (LEC) calling card, the call will be handled by that LEC or at least at rates comparable

30 Public Notice, 10 FCC Rcd 5022 (Com. Car. Bur. 1995).

31 The parties filing comments or reply comments are listed in Appendix A. The Pennsylvania Public Utility Commission (PaPUC), by motion dated May 2, 1995, requested leave to submit late-filed reply comments tendered therewith. Because there appeared to be good cause for the late filing, the PaPUC's reply comments have been made part of the record of this proceeding.

32 Resolution on Rate Caps and Branding For Operator Service Providers, adopted July 26, 1995.

33 (emphasis deleted) Letter from James Bradford Ramsey, Deputy Assistant General Counsel, NARUC, to Kathie Levitz, Deputy Chief, Common Carrier Bureau, FCC (Nov. 9, 1995) at 2 (attaching a copy of NARUC's July 26, 1995 resolution).

to their presubscribed carrier's or the LEC's rates.[34] These consumers do not discover that their calls have not been carried by an OSP with rates comparable to those charged by their LECs until they receive bills for their calls some time later.

14. Commenters suggest a number of different options for dealing with this lack of adequate information with respect to calls that are priced above a level that consumers generally expect to pay. Some suggest that the Commission should require that OSPs provide additional information audibly, before connecting the call, such as the price of the call, a representative price of the call, the phone number to call to get the price of the call, or some warning that the rates charged may be higher than the consumer expects.[35] Others suggest that the Commission should require that OSPs provide cost support for prices above the benchmark[36] and still others suggest that the benchmark should serve as an absolute ceiling or rate cap so that any rate above that hard cap would be unlawful.[37] Commenters also disagree on where the benchmark should be set. We now review these options for price disclosure for all calls, where and how to set a benchmark, and how to treat calls priced above a benchmark. We then review requirements with respect to OSPs' informational tariffs and whether we must or should forbear from enforcing such requirements. Finally, we review special circumstances relative to inmate-only telephones in correctional institutions.

A. Disclosure of Price on All Operator Service Calls

15. As an initial matter, we seek comment on benefits and costs associated with imposing a price-disclosure requirement on all 0+ calls. We note that while consumers are generally informed about the prices that they will be charged for the individual 1+ calls that they make from their homes, consumers may be unaware that 0+ calls from outside the home may be more expensive than the 1+ calls that consumers make from their homes. We ask commenters to evaluate whether the benefits of a price disclosure for each call, or disclosure of the price of a representative call, before connecting a call, would exceed the costs of such disclosures even for 0+ calls that are priced at or below the levels at which consumers expect them to be priced. We also seek comment on whether such a requirement may obviate the need to establish any benchmark-level requirements.

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[34] NAAG Reply Comments at 2; PaPUC Reply Comments at 10-11.

[35] See, e.g., Colorado PUC Staff Comments at 6; APCC Comments at 13, 15-16; NAAG Comments at 4.

[36] See, e.g., CompTel Reply Comments at 7; Comments of One Call Communications, Inc. d/b/a Opticom at 11.

[37] See, e.g., Pacific Companies Comments at 2; PaPUC Reply Comments at 5-6.

B. Setting a Benchmark

1. Appropriate Level of Benchmarks

16. While there is a general consensus among most of the commenters that benchmarks should be established to address the problem of excessive OSP rates and related premises-imposed fees (PIFs) or surcharges for calls from payphones, their views differ substantially as to the appropriate structure and level at which such benchmarks should be set.

17. CompTel's Proposed Benchmark. Proponents of the CompTel Coalition's proposed benchmarks (set forth in Appendix C) explain that CompTel designed its benchmarks to discourage rates at levels that prompted almost 95 percent of a sampling of 101 complaints filed at the Commission against OSP rates.[38] Public sector commenters uniformly criticize the benchmarks as still too high, as do Ameritech, Pacific, and Sprint.[39] NAAG observes that "there is undoubtedly a huge difference between competitive rates and the level of excessive rates which triggers the filing of a consumer complaint with the FCC."[40] The National Association of State Utility Consumer Advocates (NASUCA) agrees that the benchmarks would affect only the most egregious price gouging.[41] Ameritech states that "the number of consumer complaints that a rate precipitates is an inappropriate benchmark for implementing this mandate. Indeed, rates that are so high as to result in large numbers of consumer complaints are likely to be well above the level that is properly presumed just and reasonable."[42] Meanwhile, the Colorado PUC Staff states that 30 percent of the complaints it received about OSP rates during the previous two years concerned calls with rates *below* the CompTel benchmark.[43]

18. Largest Carriers' Prices. In addition to NAAG's proposed benchmark at "dominant carrier rates," other parties suggest variations on that benchmark based on the rates charged by

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38 See "Analysis of 101 Operator Service Rate Complaints Filed at the FCC Between May 1, 1994 and August 15, 1994," APCC Comments, Attachment 1 at 10-11; CompTel Comments at 7-8.

39 Ameritech Comments at 1-2, Reply Comments at 6-7; Colorado PUC Staff Comments at 11-12; NAAG Comments at 5-6; NYDPS Reply Comments at 2; PaPUC Reply Comments at 4; Sprint Comments at 7-8; Pacific Companies Comments at 2.

40 NAAG Comments at 5.

41 NASUCA is an association of 42 consumer advocate offices in 38 states and the District of Columbia whose members are designated by state law to represent the interests of utility consumers before state and federal regulatory agencies and the courts.

42 Ameritech Reply Comments at 6-7.

43 Colorado PUC Staff Reply Comments at 4.

the largest carriers and thus paid by the vast majority of 0+ callers. NASUCA suggests that the benchmark might be set at the highest rates charged from among the three largest carriers.[44] The Colorado PUC Staff suggests that the benchmark be set at an average of the predominant players, i.e., the four largest OSPs, over different times of day, distances, and call durations to yield an average price per minute, plus the lesser of either five percent or two standard deviations from that average.[45] The PaPUC would cap surcharges at $1 above the highest daytime tariffed rate of any facilities-based carrier, and would also support the Colorado PUC Staff option.[46] Ameritech suggests that the benchmark be set at 120 percent of the highest among the rates of AT&T, MCI, and Sprint.[47] The Pacific Companies support Ameritech's levels, but also propose their own cap of $.35 per minute plus a first minute charge of $1.20, $2.75, $3.75, or $4.75, depending upon five categories of calls. The Pacific Companies also propose their rates as an absolute cap, rather than a mere benchmark.[48]

19. Many OSPs and aggregators criticize a benchmark based on the rates of the largest carriers as an arbitrary and unfair level for triggering a punitive requirement, arguing that rates above the predominant level may be just and reasonable due to the higher costs faced by smaller OSPs.[49] CompTel declares that neither Ameritech nor the Pacific Companies explain why their proposed benchmarks are consistent with costs.[50] On the other hand, the Colorado PUC Staff maintains that its cost studies show that Tier 1 carriers' (MCI, AT&T, Sprint) rates comfortably exceed the cost of providing service, other than commissions and pass-through surcharges.[51]

20. Two parties take the position that benchmarks need not be based on costs -- assuming that they are not absolute rate caps -- but rather should reflect consumer expectations. As APCC observes:

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[44] NASUCA Reply Comments at 5.

[45] Colorado PUC Staff Comments at 10. The four largest OSPs in terms of annual telecommunications toll revenues are AT&T, MCI, Sprint and LDDS WorldCom, in that order. Long Distance Market Shares, Fourth Quarter 1995, Industry Analysis Division, Common Carrier Bureau, FCC (Mar. 1996) at Table 5.

[46] PaPUC Reply Comments at 5-6. PaPUC would also permit a surcharge to be imposed for enhanced services.

[47] Ameritech Comments at 1-3.

[48] Pacific Companies Comments at 2; Reply Comments at 3.

[49] APCC Comments at 13; AT&T Comments at 5; Industry Coalition Reply Comments at 15; Intellicall Comments at 5-7; OSC Comments at 8.

[50] CompTel Reply Comments at 9.

[51] Colorado PUC Staff Reply Comments at 4.

> Under its general Title II authority, and specifically Section 201, the FCC has previously utilized consumer expectations as a basis to impose a message notice requirement. . . . In regulating 900 services, the FCC promulgated rules requiring carriers to disclose the price of the call and a description of the product, information or service provided. However, the FCC did not require a preamble for 900 services with charges below a certain level.[52]

Furthermore, Sprint contends that a 1983 opinion of the United States Court of Appeals for the District of Columbia Circuit, concerning an overall rate of return that the Commission had prescribed for AT&T's interstate and international services, recognized that from the consumer's point of view, reasonable rates are those "which are as low as possible, but still allow the industry to provide 'adequate and efficient service' . . . ."[53] APCC's concern about establishing a benchmark level that triggers a warning is that the warning not be triggered for "rates well within consumer expectations" or else consumers will hear the message too often and tune it out.[54]

2. Other Benchmark Issues

21. Further disaggregation. The Industry Coalition urges that the benchmarks be simple so as to minimize the monitoring burden on LECs and the FCC,[55] but other commenters propose more complicated benchmarks. A few OSPs contend that any benchmark should conform to the general industry two-part pricing structure of a fixed per-call charge plus a per-minute charge.[56] Ameritech and NASUCA advocate disaggregating rate schedules to recognize different call types, the time of day, and mileage bands, arguing that the increased simplicity is not worth the loss in precision.[57] The Pacific Companies state that they do not see the need for mileage bands, while the PaPUC's chief concern is that capping automated calls at the same level as non-automated calls denies consumers a significant savings on automated calls.[58] Arguing against increased

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[52] APCC Comments at 17-18 (citing Policies and Rules Concerning Interstate 900 Telecommunications Services, 6 FCC Rcd 6166 (1991)).

[53] Sprint Reply Comments at 8-9 (citing US v. FCC, 707 F.2d 610, 612 n.4 (1983)).

[54] APCC Reply Comments at 7.

[55] Industry Coalition Reply Comments at 13-15.

[56] AT&T Reply Comments at 7 (citing OSC Comments at 5-6, Pacific Companies Comments at 2); OSC Comments at 4-6: (supporting fixed rates of $3.75 for station-to-station and $4.75 for person-to-person, and a $.35 per-minute rate); Opticom Reply Comments at 8; USOC Comments at 8-10.

[57] Ameritech Comments at 1-3; Reply Comments at 8; NASUCA Reply Comments at 5.

[58] Pacific Companies Reply Comments at 3; PaPUC Reply Comments at 5.

complexity, Bell Atlantic asks whether: (1) an OSP would be considered above the benchmark if its rate for a specific call was above the benchmark, but its average rates were below the benchmark; (2) AT&T could be considered above the benchmark for intraLATA toll calls; and (3) the OSP or LEC would be responsible for answering the consumers' questions.[59]

22. Periodic adjustments in rate levels. Some commenters express concern that a benchmark that "floated" based on the largest carriers' rates would be a costly administrative "nightmare" for OSPs and the Commission.[60] A number of parties, therefore, contend that any benchmark should be adjusted annually.[61] Ameritech notes that if the benchmark was set at AT&T's rates, then only AT&T would be able to raise rates without fear of exceeding the benchmark.[62]

Discussion

23. Based on all of the comments we have received, we find that the record supports the conclusion that we should establish benchmarks, based on the reasonable expectations of consumers, for OSPs' interstate rates and associated charges that consumers must pay for operator services. The vast majority of consumers use residential presubscribed lines or a calling card of one of the three largest interexchange carriers in terms of annual toll revenues and therefore they generally expect rate levels to be within a comparable range of the rates charged by the three largest carriers.[63] Therefore, we tentatively conclude that the most useful benchmark for protecting consumers against unexpectedly high OSP prices would be one set at a level approximating the average price charged by AT&T, MCI, and Sprint. We note that our proposed benchmark methodology (see Appendices D and E) would be based only on rates charged by those three carriers and not on the combined data of the four largest OSPs.[64] We find that incorporating the fourth largest OSP's rates into our proposed benchmark methodology, as the Colorado PUC staff suggests, would not be possible because LDDS Worldcom's rates are not readily ascertainable due to the fact that they are filed as a "range of rates" rather than a specified rate.

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[59] Bell Atlantic Comments at 2.

[60] Industry Coalition Reply Comments at 15; OSC Comments at 8.

[61] Ameritech Comments at 1-3; AT&T Comments at 4; NASUCA Reply Comments at 5; OSC Comments at 4; Opticom Comments at 12.

[62] Ameritech Reply Comments at 7.

[63] AT&T, MCI, and Sprint had the greatest toll revenues in 1995. See note 45, supra.

[64] LDDS Worldcom is the fourth largest IXC in terms of annual toll revenues. Id.

24. While NAAG and NASUCA support a benchmark at approximately the average rates of those carriers, we request comment on whether we should set benchmarks for OSP rates at some level, such as 115 percent, of the average of the three largest OSPs, a variation of the Ameritech proposal.[65] First, we recognize that different OSPs will likely average their prices over different distances or service categories. Thus, an OSP whose average rates are at or below the level of the largest carriers may, nevertheless, have rates for some types of calls that exceed those of the largest OSPs. Second, this extra price-variance margin may be beneficial to competition in the long run, because it would enable smaller new entrant OSPs, with lesser economies of scale, to escape additional regulatory burdens before they have become able to cut their costs and thus price at the level of the largest OSPs. We seek comment on our tentative conclusion that we should set benchmarks at a level reflecting consumer expectations, and that the 0+ rates charged by the three largest OSPs reasonably reflect consumer expectations, and on whether an additional price margin, such as 15 percent, is reasonable and justifiable.[66] If an additional margin is justified, we seek comment at what the level of such margin should be. We also seek comment on benchmarks set at the average of the rates charged by the three largest carriers, at the level proposed by Ameritech, and the level proposed by the CompTel Coalition.

25. Furthermore, we propose two qualifications to the benchmark that would make it administratively easier for OSPs to comply with it. First, to protect OSPs from the potential burden of needing to match immediately every rate cut made by any of the three largest OSPs, we tentatively conclude that the benchmark should be set at the average of the rates charged by the three largest carriers as of January 1 of each year plus some percent and that the benchmark (see, e.g., Appendices D and E) would apply for each period from July 1 to June 30 of the year following that month. This would allow an OSP to set its rates at or below the benchmark at the beginning of a year and leave them unchanged despite any subsequent rate cuts by the three largest OSPs. On the other hand, if industry costs were to rise and lead the largest OSPs to raise their rates, an OSP would be able to raise its rates to match rate increases of the largest OSPs. We seek comment on the reasonableness of this protection against repeated rate changes. We also seek comment on the reasonableness of a six-month lag time for OSPs to revise their rates at or below benchmarks or whether such period should be reduced to three months or some shorter period.

26. The second qualification we propose is to use a benchmark that significantly truncates the number of different rates that OSPs must consider if they seek to avoid exceeding the benchmark. As illustrated in Appendices D and E, the proposed benchmark structure would recognize six characteristics of a 0+ call that might lead rates to vary:

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[65] Under Ameritech's approach the benchmarks would be set at 120 percent of the highest of the three largest carriers' rates, rather than at the relative, weighted average of the largest carriers' rates methodology used in Appendices D & E.

[66] Parties are free to comment on, or to supplement their comments on, any proposals that are already part of the record in this proceeding. Parties may also incorporate by reference comments filed pursuant to the Bureau's March 13, 1995 public notice.

(1) how much live or automated operator assistance it requires; (2) whether the called number is entered by the caller; (3) the time of day; (4) whether it lasted for the initial minute only or whether it included subsequent minutes; (5) the distance covered; and (6) whose credit card is used. The permutations of these variations could create a maximum of about 528 different rates, although, in practice, many of those rates would be identical. The single-benchmark would be set at some specified percentage above the average of the highest rates the three largest OSPs charged for calls in any of the six above-mentioned characteristics. We seek comment on both this general proposal to truncate the benchmark of rates employed and on the particular choices of characteristics we propose for the benchmark.

27. We believe that all competitors in a competitive market already expend resources to keep track of their competitors' prices so as to retain customers by matching competitors' price cuts. Nevertheless, we seek comment on what additional administrative costs OSPs would face to maintain prices at or below the benchmark, i.e., costs that they would not have incurred in the absence of the imposition of this benchmark. In this vein, although we tentatively conclude that we should not require OSPs charging rates below the benchmark to make additional rate disclosures, we seek empirical data to support or refute our assumption that the cost of such disclosures to consumers and OSPs, in terms of time and other burdens, would exceed the benefit that the disclosures would provide by giving consumers additional information.

28. We recognize that, as noted by Digital Network Services, Inc., no single set of rate ceilings may be appropriate in all cases and that some OSP services, e.g., those not driven by commissions and other payments to premises owners or other third persons, may nevertheless be subject to unusual but unavoidable costs, such as 0-Transfer trunk and other costs.[67] While we tentatively conclude that the initial OSP benchmark rates for all OSPs should be set at levels that reflect the average rates charged by the largest OSPs (i.e., AT&T, MCI, and Sprint, plus 15 or some other percent), we intend to delegate to the Bureau authority to reformulate the calculation of these benchmarks by (a) adding carriers to or deleting carriers from this benchmark group, or (b) making such other changes in the calculation of these benchmarks as the Bureau deems necessary to effectuate the policies established in this docket.

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[67] See Ex Parte letter from Mitchell F. Brecher, counsel for Digital Network Services, Inc., to William A. Caton (April 27, 1995); Ex Parte letter from Mitchell F. Brecher to William A. Caton (May 18, 1995). LECs generally provide operator transfer service (0- Transfer) whereby a LEC operator who receives a 0- call from a party seeking to place an interstate call transfers that call directly to the interexchange carrier (IXC) selected by that party. 0- Transfer services also are offered by certain LECs that do not offer interexchange services (i.e., by dialing 0 to an interexchange carrier operator who arranges for billing and completion of the call).

D. Consequences of Exceeding the Benchmark

1. Regulatory Options

29. As NAAG and APCC explain, a benchmark need not necessarily serve as an absolute ceiling on rates.[68] It might simply be used to differentiate the rates that consumers can be expected to find reasonable without further information from those rates that require further attention from regulators or consumers before it is clear that they are reasonable. Thus, commenters propose three somewhat different types of consequences for OSPs that desire to charge rates above the chosen benchmark. These options require those OSPs to provide: (1) cost support for such rates; (2) a message warning callers that their rates may be higher than expected; or (3) the price of the call. The NYDPS and PaPUC also express support for a prohibition on LEC billing for OSPs whose rates exceed the benchmark unless the Commission has found those rates to be reasonable.[69]

30. Cost Support. CompTel states that if the rate were above the benchmark, the burden would be on the carrier to justify that the proposed rate was reasonable, based on seven categories of costs it identifies.[70] Opticom objects to limiting costs to seven categories, and OSC insists that OSPs must have ample opportunity to justify rates that are above the benchmark. The former advocates a quick process for justifying rates above the benchmark and for the recognition of a category of intangible costs.[71] Ameritech and NASUCA propose that rates above the benchmark should be filed on 120-days' notice, accompanied by detailed cost support, and Ameritech advocates imposing an extremely high hurdle to justify such rates.[72] NAAG expresses concern that CompTel's benchmark would only expose OSPs exceeding it to an expedited paper hearing, much less thorough, with less public participation, than traditional rate-setting. According to NAAG, the inevitable result would be that many OSP tariffs in excess of the proposed benchmark would remain in effect after limited review of the OSPs' cost justifications.[73]

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68 NAAG Reply Comments at 4; APCC Comments at 4.

69 NYDPS Reply Comments at 2; Pa PUC Reply Comments at 9.

70 CompTel Reply Comments at 7.

71 OSC Comments at 3-4; Opticom Reply Comments at 13-14.

72 Ameritech Comments at 1-3; NASUCA Reply Comments at 5.

73 NAAG Comments at 6-7.

31. Warning Message. NAAG proposes that OSPs charging rates above the benchmark be required to provide the following audible message:

> This may not be your regular telephone company and you may be charged more than your regular telephone company would charge for this call. To find out how to contact your regular telephone company, call 1-800-555-1212.[74]

Some commenters charge that the reference in this warning to one's "regular" telephone company is confusing.[75] Others find it confusing in other ways,[76] and still others complain that the required reference to competitors is unfair.[77] The APCC states that the proposal is equivalent to requiring a small business that sells consumer products with higher prices than a large national retail chain to disclose to its customers that its prices are higher than that chain's prices.[78] AT&T concludes that NAAG's message would slow call processing and would have no impact on OSP rates.[79] CompTel and OSC state that there is no evidence that consumers would understand the warning or that the added delay would be worth the benefit of the warning. Furthermore, CompTel charges that NAAG improperly assumes that consumers who remain connected to an OSP after the bong tone do not consider the carrier to be acceptable. It notes that the NAAG proposal could yield three calls in place of one, which would be counter to simplifying the process.[80]

32. APCC and NYNEX oppose the NAAG warning, but agree that customers should be notified when rates are unexpectedly high. NYNEX contends that the NAAG proposal would burden LECs with the duty of providing directory assistance for consumers who want alternative carriers. Thus, it would modify NAAG's warning to direct callers to check the posted information that TOCSIA requires to be placed on or near every public phone.[81] APCC, declaring that "consumers should be alerted that they are about to incur such unusually high

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74 NAAG Petition at 4.

75 APCC Comments at 14; OSC Comments at 7-8; Opticom Reply Comments at 14; SWBT Comments at 3-4; USW Reply Comments at 29.

76 CompTel Comments at 11 (unspecified possibilities that the charge "may" be "more" than the consumer might otherwise pay); NYNEX Comments at 4 (customers may assume they will be connected directly to their carrier of choice).

77 APCC Comments at 13; USW Reply Comments at 27.

78 APCC Comments at 13.

79 AT&T Reply Comments at 9.

80 CompTel Comments at 11; OSC Comments at 7.

81 NYNEX Comments at 3-4; see 47 U.S.C. § 226(c)(1) (aggregators must post certain information about a presubscribed OSP's rates on or near the telephone instrument, in plain view of consumers).

charges," offers an alternative message for any OSP charging an above-benchmark rate after a certain date: "The rates charged by this provider exceed benchmarks established by the government. Check the information posted on or near the telephone for the toll-free number to obtain rate information before placing your call." According to APCC, the Industry Coalition warning would apply if any rate is above the benchmark, on a phone-by-phone basis.[82]

33. NAAG responds that NYNEX's reference to a posted rate would be less effective than an audible warning because experience shows that postings are "often either out of date, missing, vandalized, or otherwise unavailable to consumers using those phones."[83] US West alleges that the APCC message is also unsatisfactory,[84] and Ameritech avers that the APCC and NYNEX voice-overs are more confusing than NAAG's.[85] CompTel responds that all the messages are confusing and "assume that all rates above a dominant carrier's rates are 'bad'." It also states that the APCC warning above the benchmark is unfair, because it would apply to "reasonable" rates, and "differential" treatment of carriers offering reasonable rates is inappropriate.[86] US West adds that certain OSPs would not be able to price below the largest carriers' rates because of their cost structures, and GTE argues that double-branding plus OSP self-reporting of rates makes this unnecessary.[87] NAAG warns that whatever additional disclosure the FCC requires should be strictly prescribed, since the Attorneys General's experience with pay-per-call disclosures indicates that varying disclosures could confuse consumers, e.g., with double-negatives.[88]

34. Disclosure of Price. Colorado PUC Staff proposes that instead of any specific warning, that OSPs with rates above the benchmark be required to disclose the actual price they will charge for the call dialed -- both the charge for the initial period (including surcharges) as well as the subsequent period charges.[89] The Colorado PUC Staff states that "disclosure of prices prior to consummation of a transaction is a basic tenet of our economic system. . . . If new entrants cannot, or choose not to compete on price, then government should not institutionalize inefficiency, anti-competitive behaviors, or guaranteed revenue stream through artificially high

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82 APCC Comments at 15-16; Reply Comments at 9.

83 NAAG Reply Comments at 3.

84 U S West Reply Comments at 29.

85 Ameritech Reply Comments at 10.

86 CompTel Reply Comments at 18-20.

87 U S West Reply Comments at 28; GTE Reply Comments at 6.

88 NAAG Reply Comments at 3.

89 Colorado PUC Staff Comments at 6.

rate caps."[90] Colorado PUC Staff further states that it is "convinced that most, if not all, [OSPs] have the capability of accessing a data base that provides specific rates for the specific call in question. . . . Any proclamation by the industry that such disclosure would require extensive cost outlays should be thoroughly scrutinized."[91] NAAG, NASUCA, and the PaPUC all support this proposal, and the latter notes that no carrier has complained that the cost of setting up the warning would be prohibitive.[92]

2. Discussion

35. We tentatively conclude that the Commission should adopt oral disclosure rules as suggested by the Colorado PUC Staff. We find that the record provides strong support for requiring OSPs to inform consumers of the total charges for which they would be liable for the initial rate period and each subsequent rate period if those charges, including any and all surcharges, exceed the benchmark, and thus consumers' expectations, discussed above. Alternatively, we believe that consumers might receive adequate information for identifying an OSP if that OSP orally disclosed the highest amount that it might charge the caller for a domestic call lasting seven minutes (which appears to be the average length of a 0+ call). If the OSP believed that this highest rate would unfairly mislead callers, it could also inform the caller of its average rate for a seven-minute call. Thus, OSPs could be permitted to use a price averaged over all time periods and mileage bands (appropriately weighted to reflect actual traffic patterns). The OSP could calculate that average price by simply dividing its total 0+ gross revenues over the most recent period for which it had data by the total 0+ minutes it carried during the period, and adjust that average to reflect any subsequent price changes. We believe that either of these price-disclosure requirements would be more effective in achieving our goal of providing callers with an "opportunity to make informed choices in making operator services calls"[93] than the messages proposed by NAAG, NYNEX, and APCC or a requirement that we evaluate the cost support provided by OSPs.

36. This disclosure requirement is consistent with TOCSIA's directive that we require OSPs to identify themselves, because we believe that few consumers can truly distinguish smaller OSPs from larger, better known OSPs, other than by price. We believe that either of these disclosure requirements would ensure that consumers do not unintentionally or inadvertently use carriers that charge unexpected high rates for interstate calls[94] or use such carriers only because they are unaware that they have other options. We believe that this disclosure requirement can

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[90] Id. at 6, 13 (emphasis in original).

[91] Id. at 9-10.

[92] NAAG Reply Comments at 3; NASUCA Reply Comments at 5; PaPUC Reply Comments at 10-11.

[93] 47 U.S.C. § 226(d)(1)(B).

[94] Cf. id. § 226(d)(1)(A).

eliminate prices charged in excess of competitive rates and save what commenters have estimated costs consumers approximately a quarter of a billion dollars per year.[95] At the same time, we do not believe that this disclosure requirement would necessarily harm those OSPs that charge relatively high rates, if they also offer superior services, e.g., higher quality lines for better fax results or language translation services, that justified higher prices. Callers who preferred such high-priced OSPs would also be able to avoid the delay due to price disclosures by calling via an access code rather than making a 0+ call.

37. We invite comment on the costs and benefits of the two alternative price disclosure requirements and on the costs and benefits of requiring all OSPs to disclose their rates on all 0+ calls. We also seek suggestions for alternative disclosure requirements that would represent more effective and efficient means for providing consumers with the information that they need to make fully informed decisions regarding the choice of an OSP. We expect those OSPs that would be subject to the price disclosure requirements discussed above to begin to take the actions necessary to be able to implement them in a timely manner.

E. Forbearance from Applying Informational Tariff Filing Requirements

38. Under the 1996 Act, we must forbear from applying any regulation or provision of the Communications Act if we determine that such forbearance is consistent with the statutory criteria listed in Section 10(a). The 1996 Act enacted new Section 10(a) of the Communications Act which provides as follows:

> REGULATORY FLEXIBILITY. -- Notwithstanding section 332(c)(1)(A) of this Act, the Commission shall forbear from applying any regulation or any provision of this Act to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets, if the Commission determines that --
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> (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;
>
> (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
>
> (3) forbearance from applying such provision or

[95] See Further Notice, 9 FCC Rcd at 3323, n.24. While some parties who filed additional comments in response to the Further Notice believe that our $260 million/year consumer savings estimate was either greatly underestimated or greatly overstated, we believe on the basis of the entire record that our quarter billion dollars annual savings estimate is reasonable.

regulation is consistent with the public interest.[96]

In determining whether forbearance from applying a particular provision of the Communications Act or regulation is in the public interest, the Commission must consider whether forbearance will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services.[97]

39. Section 226 of the Communications Act, added by TOCSIA, requires OSPs to file informational tariffs "specifying rates, terms, and conditions" for their operator services offerings.[98] We recently sought comment on our tentative conclusion that we are required by the 1996 Act to forbear from applying the Section 203 tariff filing requirement to non-dominant interexchange carriers for domestic interexchange services.[99] We did not, however, there address whether we should exercise forbearance authority with respect to Section 226 of the Communications Act, which requires OSPs to file informational tariffs of rates for their domestic interstate interexchange telecommunications services.[100]

40. We seek comment on whether enforcement of the Section 226 tariffing requirements with respect to non-dominant interexchange OSPs: (1) is unnecessary to ensure that non-dominant interexchange carriers' charges, practices, or classifications are just and reasonable, and

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[96] 1996 Act at § 401 (adding Section 10(a), 47 U.S.C. § 160(a)).

[97] The 1996 Act provides, in relevant part, that:

> In making the determination under subsection [10](a)(3), the Commission shall consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition among the providers of telecommunications services. If the Commission determines that such forbearance will promote competition among providers of telecommunications services, that determination may be the basis for a Commission finding that forbearance is in the public interest.

Id. (adding new Section 10(b), to be codified at 47 U.S.C. § 160(b)).

[98] 47 U.S.C. § 226(h)(1)(A). Unlike proposed rates filed under Section 203(a) of the Communications Act that are subject to suspension, rates in tariffs filed under Section 226 may be effective upon filing. See id. (changes in such rates shall be filed no later than the first day on which the changed rates are in effect); see also H.R. Rep. No. 213, 101st Cong., 1st Sess. 14 (1989) (rates need only to be filed within a reasonable time after becoming effective).

[99] In the Matter of Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934, as Amended, Notice of Proposed Rulemaking, FCC 96-123 (released March 25, 1996), CC Docket No. 96-91 at paras. 19, 32 (IXC Tariff Forbearance NPRM).

[100] Id. at para. 20 (issue of forbearance from applying Section 226 of the Communications Act "will be addressed in a separate upcoming proceeding.").

are not unjustly or unreasonably discriminatory; (2) is unnecessary for the protection of consumers; and (3) if so, under what circumstances forbearance from applying the requirement for informational tariffs would be consistent with the public interest. Specifically, we seek comment on whether we should forbear from applying Section 226 tariff filing requirements to non-dominant interexchange OSPs if they either provide an audible disclosure of the applicable rate and charges prior to connecting any interstate 0+ call from a payphone location, or certify that they will not charge more than FCC-established benchmarks for such calls. We note that TOCSIA authorizes us to waive the requirement for informational tariffs if we determine that such tariffs no longer are necessary to: (1) protect consumers from unfair and deceptive practices relating to their use of operator services to place interstate telephone calls; and (2) ensure that consumers have the opportunity to make informed choices in making such calls.[101]

41. In seeking comment on whether to enforce the Section 226 tariffing requirements, we note that the filing of informational tariffs by non-dominant interexchange OSPs may not be the optimum or even a necessary mechanism to ensure that their charges and practices for domestic, interexchange operator services are just and reasonable and are not unjustly or unreasonably discriminatory. Unlike tariffs filed under Section 203 by the largest OSPs,[102] informational tariffs that other OSPs file under Section 226 of the Communications Act for their interstate operator services are effective without notice upon filing and often include substantial surcharges of payphone owners and other aggregators. Our experience has been that such tariffs have not always been adequate to ensure that charges, surcharges and practices for domestic, interexchange operator services are just and reasonable. Because the rates and charges in informational tariffs, unlike those of the largest carriers, are not subject to suspension and investigation before they are effective, mechanisms other than informational tariffs may better serve to ensure that OSPs' charges and practices and related aggregator surcharges are reasonable and not unjustly or unreasonably discriminatory.

42. The volume of complaints we receive concerning the level of rates and charges in informational tariffs indicates that such tariffs may be ineffective in ensuring that consumers placing 0+ calls from aggregator locations are not billed for charges higher than they are willing to pay. We note that there is a significant difference in the transactional nature of 0+ calls from public payphones. Unlike consumer expectations for IXC services generally, where consumer price expectations are set prior to the purchase of a service by presubscription arrangements, the 0+ calls from aggregator locations do not have similar ex-ante mechanisms and thereby create opportunities for rate abuses. In most instances, consumers that make 0+ payphone calls are in transit limiting their ability to forge a long-term relationship, and the attendant benefits of such a relationship, with an OSP. In addition, the absence of price disclosure at the point of purchase for operator services virtually eliminates the consumer's ability to negotiate with some bargaining power. These two conditions -- the transient status of the caller and the lack of price disclosure

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[101] See 47 U.S.C. § 226(h)(1)(B).

[102] The largest carriers have filed their tariffed rates for their interstate as well as international operator services pursuant to Section 203.

at the point of purchase -- provide OSPs with the opportunity to increase profitability by providing an otherwise competitive product at above-market rates. We believe that a requirement that OSPs disclose the specific price of a call to the consumer before connecting a call would better protect consumers from unexpectedly high charges than the filing of "informational" tariffs, which are effective without prior notice and provide very limited protection at the time of purchase. Based on this analysis, we seek comment on whether the most effective long-term solution for protecting consumers is to provide them with a mechanism for exercising choice, such as by entering into a long-term relationship with carriers, by having an audible brand stating the price of any call before the call is connected, or additional branding stating the price of any call that would exceed established benchmarks.

43. We also seek comment on whether forbearance from requiring tariff filings for non-dominant interexchange OSPs will promote competition and deter price coordination. We have previously found in the Sixth Report and Order in the Competitive Carrier proceeding that "requiring non-dominant carriers to file tariffs can: (1) take away carriers' ability to make rapid, efficient responses to changes in demand and cost; (2) impede and remove incentives for competitive price discounting; and (3) impose costs on carriers that attempt to make new offerings.[103] We also concluded that continuing to require non-dominant carriers to file tariffs presents an opportunity for collusive pricing by competing carriers because carriers can ascertain their competitors' existing rates and keep track of any changes by reviewing filed tariffs.[104] The Commission indicated that this may encourage carriers to maintain rates at artificially high levels.[105] Specifically, we seek comment on whether price information at the point of purchase, rather than the availability of pricing and other material information from the public tariffs of rivals, is more likely to allow consumers to exercise rational purchasing decisions, encourage OSPs to initiate price reductions and other competitive programs, and impose market-based discipline on abusive OSPs.

44. Finally, in IXC Tariff Forbearance NPRM, we tentatively concluded that forbearance from requiring non-dominant interexchange carriers to file tariffs should be implemented on a mandatory basis in order to establish a more market-based environment that will help prevent certain possible anti-competitive practices and better protect consumers.[106] We also tentatively concluded that, if we adopt a mandatory detariffing policy, non-dominant carriers should be required to maintain at their premises price and service information regarding their interstate,

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[103] Sixth Report and Order, 99 FCC 2d 1020, 1030 (1995), vacated on other grounds, MCI Telecommunications Corp. v. FCC, 765 F.2d 1186 (D.C. Cir. 1985).

[104] Id.

[105] Id.

[106] IXC Tariff Forbearance NPRM at para. 34.

interexchange operator service offerings, that they can submit to the Commission upon request.[107] We noted that, in adopting its prior mandatory detariffing policy, the Commission required affected carriers to maintain such information at whatever company location they desired.[108] We seek comment on whether, if we find that we should forbear from applying the requirements for informational tariffs by non-dominant OSPs, we should similarly adopt a mandatory detariffing policy for their domestic operator services and require them to maintain at their premises price and service information regarding their interstate, interexchange offerings, that they can submit to the Commission upon request. We also solicit comment as to how long carriers should be required to retain records of their rates, and any applicable aggregator surcharge, for interstate 0+ calls from aggregator locations.

F. Range of Rates Informational Tariffs

45. If, based on the comments, we conclude that we should not forbear from enforcing the informational tariff-filings required of OSPs under Section 226 of the Communications Act, we believe that we should establish rules to guide OSPs regarding specific tariff-filing requirements. Unlike Part 61 of our rules, which applies to tariffs filed pursuant to Section 203(a) of the Communications Act, we have not adopted rules specifically addressing procedures for filing tariffs pursuant to Section 226 of the Communications Act. The Bureau, however, has issued two public notices specifying filing procedures for OSP informational tariffs.[109] In particular, the Bureau has specified, inter alia, that "[c]harges should be stated in dollars and cents and should not include cross-references to any other document"[110] and, in dicta, that "if an OSP's informational tariff states its rates as a range of rates (as TOCSIA permits OSPs to do), that OSP's rate compilation should also contain a range of rates."[111]

46. Apparently relying on the Bureau's OSP Order, a number of OSPs have denoted a range of rates in their informational tariffs in lieu of specific charges. We have reviewed this practice in light of two significant and apparently related developments since the enactment of TOCSIA in 1990. First, hundreds of OSPs now compete with AT&T, MCI, and Sprint in the operator services marketplace,[112] compared to approximately the three dozen competitors that

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107 Id. at para. 36.

108 Id. at n. 91, citing Sixth Report and Order, 99 FCC Rcd at 1034.

109 Public Notice, 5 FCC Rcd 7444 (Com. Car. Bur. 1990); Public Notice, 7 FCC Rcd 3335 (Com. Car. Bur. 1992).

110 Public Notice, 7 FCC Rcd 3335.

111 Policies and Rules Concerning Operator Service Providers, 6 FCC Rcd 2314, 2316 (Com. Car. Bur. 1992) (OSP Order).

112 See Sprint Comments at 11.